Supreme Court, U.S.
FILED

081433 DEC 8 - 2008

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No. 08-

IN THE

Supreme Court of the United States

STEPHAN J. LAWRENCE
Petitioner,

v.

ALAN GOLDBERG, ET AL
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court can, at the request of a litigant, initiate and conduct civil contempt proceedings in a manner inconsistent with the Constitution and statutory protections of law using amorphous standards to *indefinitely* imprison a debtor (here for over six years) and fine him approximately $30,000,000, without charging him with a crime and trying him before a jury and without guidance from this Court as to the rights due him.

2. Whether an indeterminate fine of approximately $30,000,000 imposed on individual bankruptcy debtor, without identification of the payee party, and without ability to pay and imprisonment for over six years, is a criminal contempt sanction in *light of International Union, UAW v. Bagwell*, 512 U.S. 821 (1994)

3. Whether the use of civil contempt "equity" powers and secret proceedings in bankruptcy court against a debtor, concerning turnover of assets transferred six years prior to a bankruptcy filing, violates the Fifth Amendment's due process clause and privilege against self-incrimination privilege and the Sixth Amendment where (1) the debtor had been secretly referred to the U.S. Attorney's Office for prosecution; (2) no immunity was granted; (3) the "act of production" constitutes an admission to hiding estate assets, a bankruptcy crime; and (4) *the debtor's self-incrimination claims, all other claims, and fines were ruled to be unreviewable.*

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The opinion of the United States Court of Appeals for the Eleventh Circuit. App 1a. The Eleventh Circuit ruled it had no jurisdiction to hear the appeal of Alan G. Goldberg, bankruptcy trustee in the Chapter 7 estate of Petitioner Stephan J. Lawrence and cross-appeal of Lawrence. The decision of the United States District Court for the Southern District of Florida. App 9a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 4, 2008, App 1a, and reconsideration was summarily denied on July 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On September 29, 2008, Justice Thomas granted an extension of time to file this petition until December 6, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person ... shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial, ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Self-Incrimination Clause of the Fifth

Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

STATEMENT OF THE CASE

This case concerns fundamental questions about the rapidly expanding use of civil contempt in United States courts. Today, any litigant can initiate civil contempt proceedings. Once underway, the initiator obtains the benefit of subjecting his opponent to amorphous standards that vary inter circuit, intra circuit, state to state, court to court, and can even vary in a particular case. The initiator's often successful contempt goal may be, under the mantle of "equity," to deprive their opponent of Constitutional and other rights otherwise guaranteed by law. Unrestrained penalties, including *indefinite* incarcerations up to *life imprisonment*, may be meted out without the contemnor being charged with a crime and tried before a jury. Ever shifting standards in civil contempt proceedings are a concrete means of circumventing to the Constitutional and statutory rights due all united states citizens who daily enter all courts. This case is a case in point. There is currently no guidance from this Court on the constitutional and statutory protection due citizens, including an outside limit to a period of incarceration, once they become potential civil contemnors.

Petitioner Stephan J. Lawrence, a bankrupt debtor, was held for over six years in prison and fined approximately $30 million (the amount cannot be ascertained nor was the payee ever identified), under the label of "civil" contempt. The contempt sanction

was originally entered to turn over assets transferred to a lawful trust established outside of the United States six years before his bankruptcy filing in June 1997. The assets, as a matter of law, were never estate assets, *In re Brown*, 303 F.3d 1261, 1268 n.9 (11th Cir 2002) (identifying the Lawrence family trust as a valid trust with an invalid spendthrift clause and assets, transferred to such trust, as the trust's assets, not the settlor's). The basis for Lawrence's liability was a one line "finding," issued as a discovery sanction under Fed.R.Civ.P. 37(b). The sanction resulted from a July 1998 Rule 37(b) hearing in a discharge proceeding conducted under 11 U.S.C. § 727. *In re Lawrence*, 227 B.R. 907, 918 (Bankr. S.D. Fl 1998). Section 727 only provides for denial of debtor's bankruptcy discharge[1]. Ultimately, after many years of Lawrence's imprisonment, the District Court ruled: "at the same time, our Constitution prohibits imprisonment for *unlawful* debt," App 14a (emphasis added). However, under the amorphous standards of civil contempt, Lawrence was precluded from raising that defense. App 18a, 29a. Since the initial review of Lawrence's contempt sanction, which began in 2000, *In re Lawrence*, 279 F.3d 1201 (11th Cir. 2002), there has never been another review of the contempt by the appeals court.

In late 2004, four years after Lawrence was imprisoned and as a result of a petition for mandamus, he obtained access to a sealed bankruptcy court record. From that record he first learned that

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[1] 11 U.S.C. § 727, in relevant part, states: "(a) The court shall grant the debtor a discharge, unless— ... (c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section."

since May 1998, before the July 1998 Rule 37(b) hearing from which the Rule 37(b) discovery sanction issued, the bankruptcy court had begun conducting many *ex parte* closed hearings. At the hearings, extensive hearsay evidence, consisting of the sworn and unsworn hearsay testimony of an uncountable number of witnesses, including hearsay from unnamed "confidential informants," was presented against Lawrence.[2] In addition, significant material court fillings were kept off the docket.[3] The initial appeal centered on *remanding* the contempt proceedings back to the bankruptcy court. In stark contrast to the closed hearings, at the far fewer relevant public hearings, no evidence was ever introduced against Lawrence. The Bankruptcy Court

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[2] In early May 1998, opposing counsel submitted his personal sworn affidavit, under seal, falsely attesting to "personal knowledge" of multiple hearsay statements that Lawrence was, and intended to continue, witnesses tampering and obstructing justice on matters critical to the discharge proceeding. The bankruptcy court issued an order to keep the affidavit and supporting motion off-the-docket. App 19a. No other supporting witnesses or statements on that matter were ever introduced.

At the subsequent Rule 37(b) hearing Lawrence was then prohibited from introducing witnesses evidence supporting his testimony and the basis for the sanction was "credibility." *In re Lawrence*, 227 B.R. 907, 910 & n.4 (Bankr. S.D. Fl 1998): "The Court denied the Debtor's request to call this witness as the only relevant inquiry, at the hearing was the Debtor's personal knowledge [.]" *Id.* at 910 n.4; "[T]he Debtor was the sole witness." *Id.* at 910

[3] Lawrence discovered from the sealed record that at least thirteen *ex parte* hearings had been held. The exact number has never been provided him, despite his requests for that information. In late 2005, he first learned there were transcripts of four key hearings.

based its public and sealed orders on the *entire* record presented to it. The District Court, the court with Article III supervisory power over the contempt-- but without being informed of the existence of the sealed matters-- emphasized the importance of its review of the *entire* bankruptcy record to its de novo review of the contempt sanction. *In re Lawrence* 251 B.R. 630, 639 (S.D. Fla. 2000) ("It is important for the court to consider the whole record[.]").

Electronic surveillance of Lawrence's and his attorneys' communications, including appellate attorneys, by the Trustee, began at about the time Lawrence's appeal to the appeals court commenced in late 2000. The Trustee, over the objections of the U.S. Attorney's Office ("USAO") and the Bureau of prisons ("BOP"), obtained tapes of all of Lawrence's attorney-client (and other) phone communications for close to one year and possibly longer. App 20a, 24a, 25a, 27a, 31a [4] [5] [6]. No one notified the appeals court,

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[4] These parties stated that under 18 U.S.C. § 2510-22 (the "Wiretap Act") and the Privacy Act, 5 U.S.C. § 552a, it was illegal to provide the trustee with the BOP's law enforcement tapes, which are used for prison security purposes. App 31a.

[5] There were at least five hearings on the surveillance matters from late 2000 into 2001. Lawrence, in late 2005, only first learned of the hearings and that four had been recorded, and then filed their transcripts in the district court. The USAO and BOP were in attendance at the four transcribed hearings. None of the other *ex parte* hearings appear to have been recorded and no answer has been forthcoming from the trustee to inquiries on that information.

[6] In April 2006, the trustee's attorneys first disclosed that the contents of the law enforcement tapes were provided to Lawrence's largest creditor, Bear Stearns & Co., Inc.,

even under seal, that the Trustee's attorneys were eavesdropping on Lawrence and his appellate attorneys throughout his appeal to that court.

None of the foregoing sealed matters was disclosed to the district court, the appeals court, or to Lawrence and his attorneys. The Trustee's attorneys, while concealing those matters, continued eavesdropping during the contempt appeal and other proceedings, including a habeas corpus proceeding. The subject matter of the intercepted communications was attorney-client communications covering the full scope of the bankruptcy case and all appellate strategy.

The sealed record also disclosed that Lawrence had been referred to the USAO for prosecution concerning the turn over. The trustee made it clear that an entrapment plan was in involved. Compliance by Lawrence would provide the admission needed to secure his criminal prosecution for hiding estate assets. Self-incriminating admissions would come from the testimonial value of the "act of production" where Lawrence (i) admits estate assets are involved by performing the act of complying with an order to turn over "estate assets"; (ii) similarly admits he was concealing estate assets; and (iii) otherwise remains in prison until he performs (i) and (ii). *United States v. Hubbell*, 530 U.S. 27 (2000). The circumstances of Lawrence's invocation of the self- incrimination privilege were highly unusual: (1) the issue of "estate property" is one of law; and (2) the standard that was used for Lawrence to be released from civil contempt

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throughout the surveillance period. This was never disclosed to any court, the USAO, or the BOP.

imprisonment was that Lawrence could only address the issue of the continued coercive effect of his incarceration, but not the issue of a legal or actual current impossibility to comply with court order[7] [8].App 29a, 18a. The district court noted that, under that standard, Lawrence was required to admit that he had lied. App 14a.

When Lawrence, after great delay in the lower courts, was eventually able to secure the chance of review by the appeals court,[9] he ran afoul of the evolved amorphous standards applicable to civil contempt. App 1a. He was unable to have his claims heard—even though he never learned of the sealed matters earlier. Lawrence's appellate claims had been fully presented to the lower courts—and ignored. App 18a, 29a. They included his invocation of his privilege against self-incrimination, and his Fifth and Sixth Amendment rights of due process, access to the court, confrontation, compulsory process, a public trial, and to counsel. He sought to invalidate prior orders on the foregoing grounds, directly, and under Fed.R.Civ.P.

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[7] Trustee's counsel, on June 17 2004 testified under oath that he was unable to ascertain if Lawrence ever had any hidden assets App 29a. This was after years of secret investigations, all highlighted with great effect during the sealed proceedings, that culminated with no evidence of hidden assets—a telling result and admission by the Trustee.

[8] The magistrate judge had ruled that he could not acertain if Lawrence had the current ability to comply with turn over, a fact already admitted by the Trustee's counsel, on June 17, 2004, when he testified he did not know if Lawrence had any hidden assets. App 29a.

[9] The subject of this Petition.

60(b).

After the initial appeal in 2000 to the Eleventh Circuit, the circumstances of the contempt changed in the bankruptcy court. Lawrence became *pro se* in late 2003. He then was excluded from key hearings. At the hearings he was not permitted to attend-- despite self-representation-- he was ordered to disclose to the Trustee his alleged hidden bank accounts. In addition, consecutive crime-fraud exception orders were issued against Lawrence's separate attorneys—based on the discharge order. All resulting testimony from the crime-fraud orders was exculpatory. Several appeals by Lawrence on these matters were not processed by the bankruptcy court. After Lawrence was released from prison, he discovered that the formerly sealed bankruptcy court record, which he had designated as part of the record in his appeal, had not been transmitted to the district court.

REASONS FOR GRANTING THE PETITION

The disarray in the application of civil contempt standards is arguably greater than the situation that led this Court to issue its landmark decision in *Crawford v. Washington*, 541 U.S. 36 (2004), replacing the unworkable standards in *Ohio v. Roberts*, 448 U.S. 56 (1980). In civil contempt there are no identifiable guidelines from this Court as to the length of time a contemnor may be incarcerated for civil contempt, a maximum fine the contemnor may be subjected to, and critically, what rights, including review rights, the potential contemnor is entitled to. Currently, *he can be imprisoned for life without a jury trial*, by even non Article III courts, without this

Court's guidance.

Because the scope of standards applicable in civil contempt proceedings affects fundamental rights due a potential contemnor, under the Fifth and Sixth Amendments, the Court's review is critical. The Court, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), in the context of enemy combatants and military tribunals, addressed some of these same issues. *Hamdan* affected only a relative handful of persons, but it set out basic guidelines. Similar guidelines are currently lacking in the civil contempt context even though concerns about the same fundamental rights exist. Importantly, *Hamdan* established a right of appeal when contemplated proceedings are violative of basic rights. Current civil contempt standards can now permit secret proceedings, held without the benefit of counsel, rights of confrontation or compulsory process, that under some circumstances become completely unreviewable—with the concomitant irretrievable loss of rights.

Lastly, the use of civil contempt, in bankruptcy, is particularly problematical because hiding estate assets is a crime under 18 U.S.C. § 157. Turn over of allegedly hidden estate assets, without immunity and under a "coercive" contempt, is the equivalent of a forced confession. Prior to the passage of 11 U.S.C. § 344, which provides for immunity under 18 U.S.C. § 6002, the Bankruptcy Code granted automatic immunity to the debtor—who must complying with statutory duties. This Court has held that a bankruptcy proceeding becomes a "criminal case," for purposes of the Self-Incrimination Clause, as long as the testimony sought from the witness "might tend to subject to criminal responsibility him who gives it."

McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); *U. S. v. Herring*, 602 F.2d 1220, 1227 & n.13 (5th Cir. 1979) ("Section 25(a)(10) compelled Dorminey to testify in the bankruptcy proceedings concerning his financial matters, but provided that the testimony so given could not be offered in evidence against him in any criminal proceeding.").

I. There Are Currently No Fixed Standards for Rights Due Civil Contemnors.

Once civil contempt proceedings are initiated, no standards currently exist as to the rights due the potential contemnor. Standards differ both inter and intra circuit. And the power given to the presiding judge, who can be a non Article III judge, becomes virtually unreviewable. A brief survey of civil contempt cases demonstrates the wide and often contradictory variance in the treatment of potential contemnors:

In *Matter of Younger*, 986 F.2d 1376 (11th Cir. 1993), the debtor had been first provided with immunity before he was held in contempt of court for a refusal to testify. Even so, 28 U.S.C. § 1826, which sets an 18 month limit for civil contempt incarceration, was ruled to govern all civil contempt sanctions in bankruptcy proceedings. That standard was not applied in Lawrence's contempt, even though raised repeatedly in the lower courts and on appeal, because other uncertain standards prevented him from advancing that and his other claims. App 1a, 18a, 29a.

In Lawrence's initial appeal, his "coercive" incarceration was originally to be "considered under the context of his claim of impossibility." App 12a.

That changed in the lower courts, and then in the appeals court to Lawrence only being permitted "to show that the contempt order has lost its coercive effect." App 6a, 18a, 29a. From Lawrence's prospective, that showing required him to admit he lied and was really concealing "estate assets" (the subject of the turn over order), and state he would never turn over the allegedly hidden estate assets. However, the Trustee, *ex parte*, had stated he would have Lawrence prosecuted based on a turn over. The appeals court also found that *Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1515 (11th Cir. 1990) ("[A] finding of civil contempt is generally not reviewable on interlocutory appeal.") prevented review of Lawrence claims. App 6a.[10]

In *Blalock v. U.S.*, 844 F.2d 1546, 1555 (11th Cir. 1988) it was found that that civil contempt was appealable under 28 U.S.C. § 1292(a)(1) ruling "civil contempt lies only to enforce an injunctive order". *Id.*

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[10] Holding aside the issue of a legal impossibility to comply, e.g., a violation of the self-incrimination clause, Lawrence's inability to currently comply was confirmed in several dispositive ways: (1) the Trustee's counsel testified on June 17, 2004 that he had no knowledge as to if Lawrence was concealing assets App 29a; (2) the magistrate, who was reviewed by the district court made a finding that he could not ascertain if Lawrence had the current ability to comply; (3) the sealed record disclosed that the trustee had undertaken a massive amount of litigation in British and other courts, extensive illegal and legal "asset hunts" using investigators of dubious background, and conducted extensive communications surveillance of Lawrence and his attorneys. All of these efforts failed to produce any evidence of hidden assets. Lawrence could not begin to duplicate the proof needed to prove a negative (he was not hiding assets) that the trustee himself showed after spending millions of dollars only to learn that Lawrence had no secret assets.

at 1548 n.2. In *Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529-30 (11th Cir. 1992) a two-step process to evaluate civil contempt was identified as (1) determining if there is a current ability to comply; and (2) then, if it exists, evaluate the coercive effect of continued incarceration.

In contrast, the Second Circuit permits successive review of civil contempt orders on merits of claims and permitted habeas corpus proceedings. *Armstrong v. Guccione* 470 F.3d 89 (2d Cir. 2006). However, its decisions have been inconsistent as to the maximum length of incarceration. It found that the plain language of 28 U.S.C. § 1826(a) set a maximum period of incarceration in all court proceedings, including bankruptcy proceedings, at eighteen months. *In re Martin-Trigona*, 732 F.2d 170 (2nd Cir.), cert. denied, 469 U.S. 859 (1984). In *Armstrong*, it was initially found that an eighteen month limit applied but subsequently that determination was rescinded.

The Third Circuit, in *Chadwick v. Janecka* 312 F.2d 597 (3rd Cir. 2002) (Alito, J.), *cert. denied,* 538 U.S. 1000 (2003), presented yet another facet of the current inchoate state of civil contempt. *Chadwick* was a federal habeas corpus case involving a state court contempt sanction. It was governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (enacted April 24, 1996). The Third Circuit, under AEDPA standards, found no current undisputed Supreme Court law that could serve to change Chadwick's state court *indefinite* civil contempt imprisonment--now 13 years. Therefore, *Chadwick* ruled it was unnecessary to determine if circuit law, under *In re Grand Jury Proceedings (Braun)*, 600

F.2d 420 (3rd Cir. 1979) (identifying an eighteen month due process limit to all federal court contempts as determined by Congress in 28 U.S.C. § 1826(a)) should be reversed: "We have no need here to decide whether *In re Grand Jury Investigation* remains good law in light of *Bagwell.* It is enough for present purposes that the state court decisions cannot be disturbed under the restricted standard of [AEDPA] review applicable in this habeas case." *Chadwick* 312 F.3d at 613.

As indicated in *Chadwick*, *Bagwell, 521 U.S. 821 (1994)* created sufficient enough confusion to reach the conclusion that no current undisputed Supreme Court law exists concerning due process in civil contempt proceedings, including an outside limit to *indefinite* incarceration. Thereby, *by default*, such imprisonment effectively becomes the current law.

Bagwell concerned a fine, not *indefinite* incarceration or the limits to contempt power when in apparent conflict with rights of potential contemnors. However, *Chadwick,* in dicta, noted the language in *Bagwell* that states a contemnor may be confined "indefinitely until he complies with an affirmative command." A full reading of that statement's context in *Bagwell* indicates it was to simply distinguish, in general, between civil and criminal contempts, in a case where only a fine, not imprisonment, was at issue and argued. For example, *Bagwell* does not appear intended to be dispositive on the legality of 28 U.S.C. § 1826. Part of the full *Bagwell* paragraph, from which the quote came, refers to: "*McCrone v. United States*, 307 U. S. 61, 64 (1939) (failure to testify). Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of

earlier release if he complies. *Shillitani v. United States*, 384 U. S. 364, 370, n. 6 (1966) (upholding as civil "a determinate [2-year] sentence which includes a purge clause". *Bagwell* at 828. *McCrone*, concerned a witness who refuses to testify, as does *Shillitani*. Both cases occurred before Congress passed section 1826. That 1826 supplanted *Shillitani* was noted in *Gelbard v. U.S.* 408 U.S. 41, 42 n.1 (1972) (stating: "[28 U.S.C. 1826(a)] was enacted as part of the Organized Crime Control Act of 1970. It was intended to codify the existing practice of the federal courts. S. Rep. No. 91-617, pp. 33, 56-57, 148-149 (1969); H. R. Rep. No. 91-1549, pp. 33, 46 (1970); see *Shillitani v. United States*, 384 U.S. 364 (1966)"). It reasonably appears that it was not the intention of this Court to invalidate Section 1826, a conclusion that must be drawn if an "indefinite" incarceration did not have an outside limit of eighteen months at least in the case of contemnor refusing to provide evidence—a "witness."

A. The Need for the Court's Guidance, Addressed in *Hamdan v. Rumsfeld, 548 U.S. 557 (2006)*, Applies In Greater Force In the Civil Contempt Context

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) addressed the right to review and minimum trial standards, albeit in the military context: "there is a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and indeed already has been, excluded from his own trial. Thus, review of the procedures in advance of a "final decision" is appropriate." pp. 52–53. In a civil contempt context, a secret trial and/or an extreme deprivation of rights is possible and may occur, particularly after an initial review. Thereby

irretrievable rights can be lost, never to be reviewed. The appeals court observed that Lawrence has likely lost fundamental rights but current civil contempt review standards made that permissible: "We also accept that the decision would be effectively unreviewable on appeal from a final judgment." App 6a.

In addition, because standards defining the application of fundamental constitutional rights that assure a fair trial can be bypassed, fraud may be encouraged. In the instant case, the Trustee's mantle and secrecy was used as a means to defraud the U.S. Government out of law enforcement tapes--the contents of which were being secretly provided to Bear Stearns & Co.. This would not have been possible if there had been constitutional and statutory guaranteed transparency.

B. The Right to Review Is Uncertain

The critical theme--that civil contempt cannot bypass review of claims that fundamental constitutional rights were violated-- was emphasized in *Bagwell*, 512 U.S. 821 (1994). *Bagwell* found it necessary to address the merits of claims that the sanctions were criminal to preserve the contemnors' constitutional rights. In this vein, *Bagwell*, following *Hicks v. Feiock*, 485 U.S. 624 (1988), states: "this Court has recognized that even for state proceedings, the label affixed to a contempt ultimately "will not be allowed to defeat the applicable protections of federal constitutional law." *Hicks v. Feiock*, 485 U. S., at 631." *Id.* at 838. The corollary to this directive requires a review of constitutional claims. Similarly, the First Circuit, in *In re Power Recovery Systems,*

Inc. 950 F.2d 798, 802 (1st Cir. 1991), stated expressly that a higher court is not bound by a bankruptcy court's label on its own judgment.

However, the above apparent directives are not applicable if the contemnor is kept unaware of earlier of bases for claims of rights violations, or if his rights are violated during remanded contempt proceedings. Under those circumstances, he cannot raise those claims. After remand, he may only raise the defense that the coercive effect of incarceration no longer exists, a standard that is "virtually unreviewable" and other claims become effectively *unreviewable.*

Here, the district court, following the bankruptcy court, effectively struck all of Lawrence's claims and limited itself to reviewing the "coercive effect of incarceration." App 18a. Thereby, Lawrence could not obtain a review of his claims that the bankruptcy court's "civil" label to the contempt sanction was incorrect—even though only the district court had a duty to conduct a de novo review under its Article III powers. The appeals court then only addressed coercive incarceration issue. App 1a.

C. Lawrence's Indeterminate (over $30,000,000) Fine Was, Under *Int'l Union, UAW v. Bagwell*, 521 U.S. 821 (1994), a Criminal Contempt Sanction

There were two parts of Lawrence's contempt fine: (1) a non-compensatory fine of $10,000/day, and (2) the Rule 37(b) discovery sanction— later interpreted as an obligation for Lawrence to pay an indeterminate number millions of dollars to the Trustee. Both were punitive criminal sanctions under *Bagwell* (identifying a civil contempt fine as being

either compensatory or coercive where a compensatory sanction is paid to the plaintiff to compensate for actual losses, while a coercive sanction is paid to the court).

Here, neither the indeterminate (still accumulating?) daily fine, now in the tens of millions of dollars, nor the unspecified multi-million dollar discharge Fed.R.Civ.P. 37(b) sanction (executed on as "turnover") were compensatory or coercive. There was never a determination that Lawrence could pay the $10,000/day fine, and common sense dictated otherwise since his alleged hidden assets were ruled to be estate property. Clearly this was not a "coercive" fine, but instead a criminal sanction. Who the fine is payable to has never been identified and it clearly was not to compensate the trustee for his actual losses. *Bagwell* found a $52 million dollar fine against a major international union to be a criminal sanction notwithstanding civil aspects, stating, "The fines assessed were serious, totaling over $52 million. Under such circumstances, disinterested fact finding and even handed adjudication were essential, and petitioners were entitled to a criminal jury trial." See also *In re Chase & Sanborn Corp.*, 872 F.2d 397 (11th Cir. 1989):

> [I]t is impossible to determine whether the fine is meant to be coercive, compensatory, or a hybrid of both.... no evidentiary predicate has been shown to support the ... fine ... there is no proof that the trustee suffered an actual loss which would support a fine payable to the trustee.

Id. at 400.

II. Civil Contemnors Are Entitled to a Clear Definition of Their Rights in Contempt Proceedings, Including Limits on the Ability of Courts to Bypass Statutory Law

In bankruptcy, it is well settled that property rights are a matter of law, not equity. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989). Assets transferred pre-filing are not "estate property": "[s]ection 704 ... outlines the duties of a Chapter 7 trustee and requires [him] to "collect and reduce to money the ***property of the estate*** for which the trustee serves * * *." 11 U.S.C. § 704(1) (emphasis added).... [under] section 541(a)(1)—property of the estate comprises only "legal and equitable interests ***of the debtor***" (emphasis added)," "as of the commencement of the case."" *In re Ozark Restaurant Equip. Co, Inc.*, 816 F.2d 1222, 1224 (8th Cir. 1987).

Here, once civil contempt was invoked, the mandatory avoidance provisions of the Bankruptcy Code were circumvented to assign personal liability to Lawrence as a Rule 37(b) sanction in a discharge proceeding under 11 U.S.C. § 727. The sanction "finding" was that assets transferred six years before the commencement of the case was "property of the estate," subject to execution under pain of contempt. Thereby, an avoidance action never occurred, despite its jurisdictional necessity under the Bankruptcy Code. See *In re Brown*, 303 F.3d at 1268 n.9 (identifying the Lawrence family trust as a valid trust with an invalid spendthrift clause and assets, transferred to such trust, as the trust's assets, not the settlor's); *In re Coggin*, 30 F.3d 1443, 1452-54 (11th Cir. 1994) ("there is no cause of action created by

section 550(a)(1) in a trustee to recover the value of an avoidable conveyance from a transferring debtor." Id. at 1454).

The Rule37(b) sanction, upon which the contempt rested, was invalid as an order assigning liability to Lawrence. The trustee lacked standing to impose liability on debtor Lawrence for a pre-filing transfer. The Court, and lower courts, have repeatedly limited the equity powers of bankruptcy courts to the confines of the bankruptcy code. "A bankruptcy court's supplementary equity powers may not be exercised in a manner that is inconsistent with the plain language and other, more specific provisions of the Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *Empire for Him, Inc., v. Capital Factors, Inc.*, 1 F.3d 1156 (11th Cir. 1993) (the Bankruptcy Court's equity powers do not extend to ignoring protections afforded by other provisions of the Code). "The bankruptcy court does not have 'free floating discretion,' to create rights outside the Code [[citation omitted]]" *In re Lloyd*, 37 F.3d 271, 275 (7th Cir. 1994); *Hartford Underwriters Insurance Company v. Union Planters Bank*, 530 U.S. 1 (2000). Recognizing this, but not addressing it because of the uniquely chaotic standards of "civil" contempt, the district court stated "but, at the same time, our Constitution prohibits imprisonment for unlawful debt." App 14a. This careful wording was no accident. It implicitly reflected the legal conclusion that Lawrence was not liable to the trustee for a pre-filing transfer, particularly where the Trustee never sought to obtain a judgment against him. Instead, Lawrence was imprisoned to pay a non-existent unlawful debt to the Trustee, in violation of Florida's Constitutional prohibition against imprisonment for debt and the

Bankruptcy Code, but made possible when the Trustee successfully invoked the "equitable" mantle of "civil" contempt to bypass the law.

Because assigning liability in the manner in which it was done, was outside of a bankruptcy court's jurisdiction, the civil contempt sanction was inappropriate. *In re Novak*, 932 F.2d 1397, 1401 n.6 (11th Cir. 1991) ("Invalidity of the underlying order is a defense to a civil contempt citation. *See United Mine Workers*, 330 U.S. at 294[.]")

The foundation on which many uses of civil contempt rest is particularly precarious because of the separation of power between the judicial and legislative branches of Government. The explosion of new contempt applications many times conflicts with the legislative prerogative to restrict, make unlawful, or tolerate particular conduct. Civil contempt power is particularly amenable to the circumvention of statutory rights when adequate remedies at law exist. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) and Circuit Judge Tjoflat's specially concurring opinion. condemns the use of coercive sanctions, including contempt and injunctions when there are other rights available under the law to the complaining party. *Chandler* notes that in such situations the imposition of contempt and contempt fines are clearly punitive. *Chandler*, 180 F.3d at 1265-73. *Chandler* notes, apropos to this case, "if the court imposes punitive sanctions, it will have effectively made criminal conduct that Congress has not deemed criminal ..." *Id.* at 1272. In the matter of property rights in bankruptcy, and this case, that warning came to pass.

CONCLUSION

For the foregoing reasons, this Petition should be granted.

Respectfully Submitted,

Stephan J. Lawrence
19500 Turnberry Way, #23A
Aventura, FL 33180
(754) 204 3009

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-10295

Non-Argument Calendar

D.C. Docket No. 05-20485-CV-ASG

STEPHAN JAY LAWRENCE,

Plaintiff-Appellee-Cross-Appellant ,

versus

ALAN L. GOLDBERG,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court

for the Southern District of Florida

Before EDMONDSON, Chief Judge, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Alan L. Goldberg, as Chapter 7 trustee for the bankruptcy estate of Stephan Jay Lawrence (the "Bankruptcy Trustee"), appeals the district court's omnibus order entered on 13 December 2006 ("Omnibus Order"),releasing Lawrence from incarceration for civil contempt. Lawrence cross-appeals for review of prior interlocutory orders. We conclude that the Omnibus Order was not a final judgment and that the conditions allowing appeal of a

collateral order are not met. We also conclude that none of the orders cross-appealed by Lawrence are appealable orders. We dismiss this appeal for lack of jurisdiction.

In June 1997, Lawrence filed a voluntary petition in bankruptcy. In July 1999, the Bankruptcy Trustee obtained an order from the bankruptcy court directing Lawrence to turn over the assets of an offshore Trust that had an estimated value of $7,000,000. Lawrence declined to comply with that order; on 5 October 1999, the bankruptcy court ordered his incarceration pending compliance. Lawrence appealed to the district court; and when the district court affirmed the contempt order, Lawrence appealed to this Court. We affirmed. *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002).

In *In re Lawrence*, we said:

> As we affirm the challenged orders, we are constrained to remind the district and bankruptcy courts that civil contempt sanctions are intended to coerce compliance with a court order.... The district court must make an individual determination in each case whether there is a realistic possibility that the contemnor will comply with the order. We are mindful that, although incarceration for civil contempt may continue indefinitely, it cannot last forever.

279 F.3d at 1300 (footnotes, internal quotation and citation omitted). In February 2005, Lawrence initiated proceedings in the district court by filing a pro se notice of appeal of a June 2004 bankruptcy court order denying his motion for release from

incarceration. The district court denied that appeal but also entered an order stating that Lawrence "may file motions with the Clerk of this Court related solely to his contempt status." Lawrence filed a motion in August 2006 that sought, among other things, "release from contempt incarceration." The district court referred the issue of whether Lawrence should be released from incarceration to a magistrate judge who, after holding a hearing, recommended that Lawrence remain incarcerated for contempt.

On 8 December 2006, the district court held a hearing on Lawrence's objections to the magistrate's report and recommendation. The Omnibus Order set out the district court's conclusion "that there is no realistic possibility that Lawrence will comply with the contempt order" and "under this holding, I must release Lawrence from his confinement...." The Bankruptcy Trustee appeals that Order; Lawrence cross-appeals a number of orders entered by the bankruptcy court and the district court.

In the Omnibus Order releasing Lawrence, the district court also said these things:

Nothing in this Order lessens or diminishes the concerns evidenced by this Court and the Bankruptcy Court in prior opinions or orders. Accordingly, the Trustee may file with the Bankruptcy Court within ten days of this Order a request for such additional protections as the Trustee deems necessary to prevent Lawrence from wrongfully having access to the Trust Res. Any failure by Lawrence to comply with a further order of the Bankruptcy Court may be subject to further contempt proceedings.

Nothing in this Order shall affect the monetary

portion of the contempt sanction entered by the Bankruptcy Court.

This Court raised the issue sua sponte whether we have jurisdiction over the appeal and cross-appeal. The parties have submitted supplemental briefs on the jurisdictional issue. We conclude that the Omnibus Order was no final judgment and that the conditions allowing appeal of a collateral order are not met. We also conclude that none of the orders appealed by Lawrence are appealable orders. We dismiss the appeal and cross-appeal for lack of jurisdiction.

A district court may review interlocutory judgments and orders of the bankruptcy court, 28 U.S.C. § 158(a); but the jurisdiction of a court of appeals is limited to final judgments and orders arising from a bankruptcy proceeding. 28

U.S.C. § 158(d)[1]; see *In re F.D.R. Hickory House, Inc.*, 60 F.3d 724, 725 (11th Cir. 1995). To be final, a bankruptcy order need not be the last order concluding the bankruptcy proceeding as a whole, see *In re Martin Brothers Toolmakers, Inc.*, 796 F.2d 1435, 1437 (11th Cir. 1986); in bankruptcy proceedings, finality may be satisfied by final

[1] One might argue that this Court's jurisdiction to review the Omnibus Order is governed by 28 U.S.C. § 1291 because the motion for release that the Omnibus Order granted was originally filed in the district court and not in the bankruptcy court. But the motion to release filed in the district court was filed in the context of Lawrence's appeal of a bankruptcy court order denying an earlier motion for release from incarceration. Because we conclude the Omnibus Order is no final order under either statute, we will not explore further this additional jurisdictional twist

resolution of a particular adversary proceeding or controversy.

In re Charter Co., 778 F.2d 617, 621 (11th Cir. 1985). But even in the context of bankruptcy proceedings, the separate dispute for which review is sought must have been finally resolved and leave nothing more for the court to do but execute judgment. See id.; *In re Tidewater Group, Inc.*, 734 F.2d 794, 795-96 (11th Cir. 1984).

The Omnibus Order fails the finality test: it does not finally resolve the contempt proceedings below. As the district court stated, Lawrence still remains subject to contempt and, indeed, further proceedings in the bankruptcy court about Lawrence's contempt were contemplated expressly in that order.[2]

The collateral order doctrine can provide a source of our appellate jurisdiction. Practical construction of the rule requiring finality as a precondition to appealability has allowed a small class of decisions that fall short of final judgment to be immediately appealed because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 69 S.Ct. 1221, 1225-26 (1949). Appellate jurisdiction may be exercised under the collateral order doctrine if the challenged order "(1) conclusively determines a disputed question; (2) resolves an

---

[2] We are informed that the bankruptcy court issued a contempt-related order in January 2007 after holding additional proceedings.

important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment." *United States v. Bowman*, 341 F.3d 1228, 1236-37 (11th Cir. 2003).

The Supreme Court has directed appellate courts to limit the collateral order doctrine and to apply its conditions stringently lest the narrow exception swallow the general rule of finality. See *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 1996 (1994); the issue of appealability "is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted...." Id. (internal quotation and citation omitted).

We accept that the issue of whether Lawrence's incarceration for contempt has lost its coercive effect is separate from and collateral to the merits of the underlying bankruptcy litigation. We also accept that the decision would be effectively unreviewable on appeal from a final judgment. But the Omnibus Order does not conclusively determine the contempt issue. Lawrence is still subject to contempt: the contempt order and the financial sanction imposed under that order remain in effect. And the Bankruptcy Trustee has initiated further proceedings in the bankruptcy court that remain pending. Lawrence is not now confined under the contempt order; but further proceedings in the bankruptcy court to secure compliance could lead again to incarceration.

"[A] finding of civil contempt is generally not reviewable on interlocutory appeal." *Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1515 (11th Cir. 1990). Precedent exists for drawing a distinction

between orders that impose a fine or penalty for contempt which may be purged by compliance and those which compliance cannot purge. The former is not appealable in an interlocutory action by the contemnor; the contemnor may appeal the latter immediately. See id.; *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 976 (11th Cir. 1986). The key is whether the contempt penalties are "conditional or subject to modification." *Howard Johnson*, 892 F.2d at 1515; *Combs*, 785 F.2d at 976.

Whatever relaxation these precedents provide for an interlocutory appeal by the contemnor, we do not accept that the Bankruptcy Trustee necessarily enjoys a symmetrical right. That this Court already has reviewed — and affirmed — the underlying order of the bankruptcy court holding Lawrence in civil contempt establishes no corollary jurisdiction for appeal by the Bankruptcy Trustee. We think review of the contempt order in this case is analogous to the review of discovery orders in civil litigation. As a general rule, a district court's order on a discovery request is no "final order" subject to appellate review. See *Rouse Construction International v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982). But a party can seek to transform an unappealable discovery order into an immediately appealable order by refusing compliance, being held in contempt, and appealing the contempt order. See *Church of Scientology v. United States*, 113 S.Ct 447, 452 n.11 (1992); *Rouse*, 680 F.2d at 745. The Bankruptcy Trustee -- unlike Lawrence -- failed to comply with no order; it cannot take advantage of the procedure outlined by the Supreme Court in *Church of Scientology*.

Lawrence has cross-appealed a number of orders issued during the course of these bankruptcy proceedings. But in the Omnibus Order presently before us, the district court addressed and decided only the very narrow issue of whether Lawrence's incarceration continued to have a coercive effect. No issue or order beyond the scope of the continued coercive effects of the contempt sanctions properly can be raised in this cross-appeal.

We DISMISS for lack of jurisdiction the appeal and cross-appeal of the district court's Omnibus Order releasing Lawrence from incarceration.

DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 05-20485-CIV-GOLD/TURNOFF

IN RE:

STEPHAN JAY LAWRENCE,

Appellant/Debtor,

OMNIBUS ORDER

THIS MATTER Is before this Court on the Magistrate Judge's Report and Recommendation IDE # 131j, the "Limited Objection of Trustee Alan L. Goldberg to Magistrate Judge Turnoff s October 6, 2006 Report and Recommendation" [DE # 135], Lawrence's "Preliminary Objections to Magistrate's Report and Recommendation" [DE # 138], and Appellant's "Amendment to Appellants Preliminary Objections to Magistrate's Report and Recommendation [DE # 151]. The Magistrate Judge's Report and Recommendation and the Objections address a Motion filed by Stephan Jay Lawrence ("Lawrence"), the Appellant/Debtor in this matter, for his "Release from Contempt Incarceration" [DE # 119] as well as a number of related Motions [DE # 120 and 121].

On August 10, 2006, Lawrence flied a Motion for "Release from Contempt incarceration" [DE # 119]. On August 25, 2006, I referred this Motion along with a series of other Motions filed by Lawrence to the Magistrate Judge [DE # 124]. On September 25, 2006. the Magistrate Judge held an evidentiary hearing. After the matter was referred to the Magistrate Judge, Lawrence filed a "Motion for Sanctions" [DE #

127] and a "Motion to Withdraw Voluntarily as Judge" [DE # 130].

In the Magistrate Judge's Report and Recommendation dated October 10, 200, the Magistrate Judge found that "Stephen Jay Lawrence has failed to meet his burden to show that the contempt order has lost Its coercive effect; 2) Stephen Jay Lawrence has failed to meet his burden to show that there exists no realistic possibility of compliance; and 3) [t]he matter should be revisited by the bankruptcy court at reasonable intervals." In the Report and Recommendation, the Magistrate Judge specifically recommended that Lawrence's "Motion for Release from Contempt Incarceration" [DE # 119] should be denied. Thereafter, Lawrence and Trustee flied a series of Objections [DE # 135, 138, and 151]. i held a hearing on December 8, 2006 to address the Report and Recommendation and Objections.

For the reasons stated in this Order, I grant Lawrence's Objections [DE # 138 and 151], reject the Trustee's Objections [DE # 135] and l decline to accept the Magistrate. Judge's Report and Recommendation [DE # 131] in part. Specifically with regard to the Magistrate Judge's Report and Recommendation, I adopt the portion of the Report and Recommendation which recommended that I deny "Appellee's Emergency Motion to Strike/Response In Opposition to Motion by Appellant for Release from Incarceration" IDE # 120] and Lawrence's "Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing" [DE # 121]. However, I reject the portion of the Report and Recommendation that recommends that I deny

Lawrence's Motion for "Release from Contempt Incarceration" [DE # 119]. Having denied Lawrence's "Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing" [DE # 121], I also deny Lawrence's Motion for Sanctions related to this Motion as moot [DE # 127j. Lastly, I deny Lawrence's "Motion to Withdraw as Judge" [DE # 130].

The Court is quite familiar with the facts of the instant case. As such, I will only address the history of this matter by way of summary. Lawrence is a Debtor who was incarcerated for civil contempt based on his failure to comply with a bankruptcy court order to turn over the res of an inter vivos trust to a Chapter 7 trustee in 2000. The history of this long and unfortunate case is set forth in the following opinions: *In re Lawrence*, 251 B.R. 630 (S.D.FIa. 2000); *In re Lawrence*, 279 F.3d 1294 (11Th Cir. 2002), and *Lawrence v. United States Bankruptcy Court*, 153 Fed.App. 552 (11th Cir. 2005),

The essence of the matter before me is framed by the Eleventh Circuit Court of Appeals:

> As we affirm the challenged orders, we are constrained to remind the district and bankruptcy courts that civil contempt sanctions are intended to coerce compliance with a court order. In *Wellington* we acknowledged that, "[W]hen civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights." The district court must make an individual determination in each case whether there is a realistic possibility that the

> contemnor will comply with the order. We are mindful that, "although incarceration for civil contempt may continue indefinitely, it cannot last forever,"
>
> Lawrence has not specifically requested the district court to review whether his continued incarceration has lost its coercive effect. This issue, however, should be considered under the context of his claim of impossibility. If the bankruptcy judge determines that, although Lawrence has the ability to turn over the Trust res, he will steadfastly refuse to do so, the judge will be obligated to release Lawrence because the subject incarceration would no longer serve the civil purpose of coercion.
>
> For the reasons assigned, the judgment appealed is AFFIRMED. We instruct the bankruptcy court to reconsider Lawrence's incarceration at reasonable intervals in order to assure that the contempt sanction continues to serve, and is limited to, its stated purpose of coercion.

In re Lawrence, 279 F.3d at 1300-1301 (internal footnotes and citation omitted).

Lawrence has now been incarcerated for contempt for more than six years. During that time, he has steadfastly refused to comply with this Court's contempt order. Upon examination of the entire record, including the Report and Recommendation of the Magistrate Judge dated October 10, 2006, I now conclude that there is no realistic possibility that he will comply. As such, it is the law of the case that I am obligated to release Lawrence because the subject

Incarceration no longer serves the civil purpose of coercion.

While the Magistrate Judge is correct that Lawrence has failed to address the issue during the hearings below, and has failed to carry and meet his burden as a result, I cannot ignore what is self-evident. Six years is longer than most terms of imprisonment for serious federal crimes. In my view, further reviewing the matter at additional "reasonable intervals" will simply not change the result.

Trustee asks this Court to resist concluding that the subject incarceration no longer serves the civil purpose of coercion. In support, the Trustee cites to the Eleventh Circuits opinion in *Commodity Futures v. Wellington Precious Metals, Inc.*, 950 F.2d 1525 (11th Cir. 1992), where the Court stated: "Prison time, in and of Itself will not satisfy Weiss's burden of proving that there exists no 'realistic possibility' that he can comply with the court's contempt order." Id. at 1531, The Trustee echoes the district court's comments in *Wellington* [quoted by the Eleventh Circuit], that: it Is far more plausible that Weiss's refusal to pay means simply that Weiss deems the detriments of incarceration outweighed by the concomitant benefits of holding onto his ill-gotten Wellington monies: Id,

In *Wellington*, Weiss, after "several months' in prison, filed a motion to terminate the civil contempt order claiming that the time he had spent in jail was proof that he did not have ihe funds required to pay the amount at issue. The time between incarceration and the denial of his motion was approximately three months. The time between incarceration and the

Eleventh Circuit's opinion was less than two years. In assessing the situation in *Wellington*, the Eleventh Circuit noted that "While each passing month of incarceration may strengthen Weiss's claim of inability (citations omitted), many months or perhaps even years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt order." This is because "It can be assumed that at a certain point any man will come to value his liberty more the [the amount of money the order requires him to pay] and the pride lost in admitting that he has lied," *United States ex ref. Thom. v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985)(cited in *Wellington*).

I do not base my ruling only on the fact that Lawrence has spent more than six years in jail. Nonetheless, the long period of incarceration is a factor when viewed in the context of the entire record. Based on the totality of the circumstances, I conclude that Lawrence has come to value his money (whatever may be left) more than his liberty. Clearly he is not to be rewarded, but, at the same time, our Constitution prohibits imprisonment for unlawful debt. Because I find that there is no realistic possibility that Lawrence will comply with the contempt order, although he still has the ability to do so, his incarceration may not last indefinitely. In light of the fact that Lawrence has "steadfastly" refused to comply, regardless of the number of "intervals" I have reviewed the matter, I am obligated to adhere to the holding of the Eleventh Circuit that "... the judge will be obligated to release Lawrence because the subject incarceration would no longer serve the civil purpose of coercion." *Lawrence*, 279 F.3d at 1301. Under this holding, I must release Lawrence from his

confinement despite his failure to purge himself of contempt.

Nothing in this Order lessens or diminishes the concerns evidenced by this Court and the Bankruptcy Court in prior opinions or orders. Accordingly, the Trustee may file with the Bankruptcy Court within ten days of this Order a request for such additional protections as the Trustee deems necessary to prevent Lawrence from wrongfully having access to the Trust Res. Any failure by Lawrence to comply with a further order of the Bankruptcy Court may be subject to further contempt proceedings.

Nothing in this Order shall affect the monetary portion of the contempt sanction entered by the Bankruptcy Court.

For the reasons stated above,

It is hereby ORDERED AND ADJUDGED:

1) The Magistrate Judge's Report and Recommendation is REJECTED IN PART and ADOPTED IN PART [DE #131]. To the extent that the Report and Recommendation recommends that Lawrence's Motion for "Release from Contempt Incarceration" [DE # 119] should be denied, I REJECT that portion of the Report. To the extent that the Report and Recommendation recommend's that Trustee's "Emergency Motion to Strike/Response In Opposition to Motion by Appellant for Release from Incarceration° [DE # 120] be denied and that Appellant's "Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing" [DE # 121] be denied as moot, I ADOPT these portions of the Report and Recommendation.

2) Lawrence's "Motion for Release from Contempt Incarceration" [DE #119] is GRANTED.

3) Trustee's "Emergency Motion to Strike/Response in Opposition to Motion by Appellant for Release from Incarceration" [DE # 120] Is DENIED.

4) Lawrence's "Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing° [DE # 121] is DENIED as moot.

5) Lawrence's request that sanctions be Imposed for noncompliance with his °Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing" [DE # 121] contained in a Reply Brief [DE # 127] is DENIED as moot.

6) Lawrence's "Motion to Withdraw Voluntarily as Judge" [DE # 130] is DENIED.

7) Lawrence's Objections [DE # 138 and 151] to the Magistrate Judge's Report and Recommendation are GRANTED.

8) Trustee's Objections [DE # 135] to the Magistrate Judge's Report and Recommendation are DENIED.

9) The Federal Detention Center is hereby directed to forthwith release Stephen Jay Lawrence, Inmate #49061-004, from incarceration.

10) Nothing In this Order shall affect the monetary portion of the contempt sanction entered by the Bankruptcy Court.

11) The Clerk of Court is Directed to CLOSE this

case.

12) All pending dates are CANCELED and all pending motions not addressed specifically in this Order are DENIED as moot.

DONE AND ORDERED, in Chambers, in Miami, Florida, this 12 day of December, 2006,

Copies furnished:

U.S. Magistrate Judge William Turnoff All Counsel of Record

U.S. Marshall Services (2 Certified).

FDC-Miami Warden

ALAN S. GOLD

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 05-20485-CIV-GOLD/TURNOFF

STEPHAN JAY LAWRENCE,
Appellant, v.
ALAN L. GOLDBERG,
Appellee.

ORDER STRIKING PLEADINGS

THIS CAUSE came on before the Court sua sponte. On January 17, 2006, this Court entered an Order of Clarification [DE # 76]. In that Order, the Court explained that Appellant, the debtor in bankruptcy who is currently incarcerated under an order of contempt issued by the United States Bankruptcy Court of the Southern District of Florida on October 5, 1999, is only permitted to file motions with the Clerk of this Court related to his contempt status. The Court further explained that it will review any filing from Appellant to determine if the filing relates to the issue of whether the civil sanctions imposed by the bankruptcy court have lost their coercive effect and thus the continued incarceration violates Appellant's due process rights. The Court made clear that if the filings from Appellant are not related to the issue of whether his continued incarceration has lost its coercive effect, those filings will be dismissed sua sponte.

Subsequent to the entry of the Court's January 17,2006 Order, Appellant has filed a number of pleadings, many duplicative of earlier filings in this case, which do not relate to the "issue of whether the civil sanctions imposed by the bankruptcy court have lost their coercive effect and thus the continued incarceration violates Appellant's due process rights".

[See DE #s 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98,99,100,101,102,103,104,105,106,107,108,109,110,111,112,113,114 & 115].

As the Court explained in its January 17, 2006 Order, these pleadings are inappropriate and are filed in violation of said order. Accordingly, it is ORDERED AND ADJUDGED that: The Clerk of Court of the Court is directed to strike the following pleadings filed by Appellant Stephan Jay Lawrence and remove these pleadings from the docket in this case: [DE #s 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99,100, 101, 102,103,104,105,106,107,108,109,110,111, 112,113,114 & 115].

DONE AND ORDERED, in Chambers, in Miami, Florida, this 5th day of March, 2006.

ALAN S. GOLD

UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

In Re:
Stephan Jay Lawrence, Debtor.

ORDER GRANTING TRUSTEE'S EX-PARTE MOTION TO SEAL PLEADINGS

THIS CAUSE came before the Court in Chambers at Miami, Florida on May 7, 1998 upon the Trustee's Ex-parte Motion To Seal Pleadings in connection with the Trustee's Ex Parte Motion Under Seal For

Authority To Employ Private Investigator, Nunc Pro Tunc to :May 4,1998, it appeariaig -to. the-Court-that the Trustee has shown just cause for the-relief requested and the Court being otherwise fully advised in the premises, it is therefore:

ORDERED that the Trustee's Ex Parte Motion To Seal Pleadings is GRANTED.

THE MOTION AND THIS ORDER SHALL NOT BE DOCKETED UNTIL FURTHER ORDER OF THE COURT.

SO ORDERED, at Miami, Florida in said district on this 7 day of May, 1998. A. JAY CRISTOL CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:

STEPHAN JAY LAWRENCE, CASE NO. 97-14687-BKC
CHAPTER 7 Debtor.

ORDER GRANTING EX PARTE MOTION FOR DISCOVERY UNDER SEAL

THE MATTER came before the Court for a status conference on December 5, 2000 at 1:30 p.m. upon the Trustee's Ex Parte Request for an in Camera Hearing and Application Under Seal to Authorize Discovery Through U.S. Bureau of Prisons (the "Application")

through which Alan L. Goldberg, the duly appointed and acting chapter 7 Trustee for the above-captioned bankruptcy case (the "Trustee") requests that the Federal Bureau of Prisons (the "FBOP") provide discovery in the form of any and all audio and/or tape recordings of outgoing calls made by Debtor Stephan Jay Lawrence ("Lawrence") from the Federal Detention Center in Miami, Florida (the "FDC") since his incarceration on September 15, 2000 and any and all records, including visitor logs, indicating the names of all persons who have visited Lawrence since his incarceration and that this discovery be provided every two (2) weeks. The Court, having considered the Application, having heard argument of counsel and being otherwise duly advised in the premises, finds that the Motion should be granted. It is therefore ORDERED:

1. The Court has subject matter jurisdiction to enter this Order pursuant to 11 U.S.C. § 105(a) which provides Bankruptcy Courts with broad powers to issue any order or process that is necessary or appropriate to carry out the provisions of Title 11, United States Code (the "Bankruptcy Code"), including 11 U.S.C. § 521(4), the statutory basis upon which this Court entered its August 26,1999 Order compelling Lawrence to turn over the res of the 1991 Lawrence Family Inter Vivos Trust to the Trustee (the "Turn Over Order").[3] The Court finds that entry of this Order is necessary to carry out the provisions of the Bankruptcy Code.

2. This Order is also based upon 5 U.S.C. §

---

[3] Lawrence is presently incarcerated for civil contempt of the Turn Over Order.

552a(b)(11) which authorizes disclosure of the requested information by a Court of competent jurisdiction.

3. The Court finds that Lawrence holds no recognized constitutional privacy interest in outgoing calls made by him from the FDC (excepting "properly placed" calls made to counsel) because of his actual knowledge that such calls are monitored and subject to recording. *Cook v. O 'Toole*, 1998 U.S. Dist. LEXIS 5846, *4 (D. Mass. 1998)("an inmate has no legitimate expectation of privacy in telephone conversations as to which he has been previously informed that they are subject to monitoring and recording.")(citations omitted). Accord *United States v. Lewis*, 1999 U.S. App. LEXIS 20337, *2-4 (9th Cir. 1999); *United States v. Workman*, 80 F.3d 688, 694 (2d Cir. 1996); *United States v. Van Poyck*, 11 F.3d 285, 290-91 (9th Cir. 1996).

4. The Court further finds that the Trustee's need for the disclosure of the requested information outweighs the privacy interests of the persons to whom the information pertains and in accordance with 5 U.S.C. § 552a(b)(11) the Court Orders disclosure of the records sought, including those which may be covered by the Privacy Act.

5. Lawrence's chapter 7 estate shall be responsible for paying and/or reimbursing the FBOP for all costs incurred with compliance with this Order.

6. The FBOP shall immediately turn over to Trustee's counsel of record the log indicating all outgoing calls (excepting "properly placed" calls made to counsel) made by Lawrence from September 15, 2000 to December 5, 2000. The FBOP shall prepare

an updated log of all outgoing calls (excepting "properly placed" calls made to counsel) made by Lawrence from December 5, 2000 to December 19,2000 and turn over that updated telephone log to the Trustee by December 19, 2000. The FBOP shall produce the documents subject of this Order as soon as practicable so that the Trustee has ample time to review same in an attempt to limit its further requests in anticipation of the scheduled December 28,2000 status conference. From and after December 28, 2000, any further disclosure of outgoing calls by the FBOP to the Trustee shall be predicated on a further Order of the Court authorizing same. Likewise, upon entry of this Order the FBOP shall turn over to the Trustee all records, including visitor logs, indicating the names of all persons who have visited Lawrence since his incarceration to date.

7. No employee of the FBOP shall disclose or discuss the fact of the entry, or the provisions, of this Order with Lawrence or any of his agents, including counsel.

8. This Order shall remain in effect until the status conference set for December 28, 2000 at 2:30 p.m. at which time further discovery, if any, will have to be authorized by further Order of the Court.

9. This Order shall be made and maintained under seal until further Order of the Court ORDERED in the Southern District of Florida on December 18, 2000.

THOMAS UTSCHIG, JUDGE

UNITED STATES BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

STEPHAN JAY LAWRENCE, CASE NO. 97-14687-BKC-AJC

CHAPTER 7 Debtor.

ORDER CONTINUING DECEMBER 18, 2000 ORDER GRANTING EX PARTE MOTION FOR DISCOVERY UNDER SEAL

THIS MATTER came before the Court on a status conference on December 28, 2000 at 2:00 p.m. on the Trustee's Ex Parte Request for an in Camera Hearing and Application Under Seal to Authorize Discovery Through U.S. Bureau of Prisons (the "Motion"). The Court, having reviewed the Motion, heard argument of counsel, and being otherwise duly advised in the premises, ORDERS:

1. All terms and provisions of the Court's December 18, 2000 Order Granting Ex Parte Motion for Discovery Under Seal (the "Order") shall continue in full force and effect for forty (40) days from December 28, 2000 or until February 7, 2001.

2. The Court shall hold a further status conference on the matter subject of the Motion and Order on February 1, 2001, at 10:00 a.m. at which time the Court will determine what, if any, further discovery will be authorized

3. This Order shall be made and maintained under seal until further Order of the Court.

ORDERED in the Southern District of Florida on January 17, 2001. A. JAY CRISTOL, JUDGE U.S. BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:

STEPHAN JAY LAWRENCE, Case No. 97-14687-BKC-AJC
Chapter 7 Debtor.

ORDER CONTINUING DECEMBER 18, 2000 ORDER GRANTING EX PARTE MOTION FOR DISCOVERY UNDER SEAL

THIS MATTER came before the Court on a status conference on February 1, 2001 at 10:00 a.m. on the Trustee's Ex Parte Request for an in Camera Hearing and Application Under Seal to Authorize Discovery Through U.S. Bureau of Prisons (the "Motion"). The Court, having reviewed the Motion, heard argument of counsel, and being otherwise duly advised in the premises,

ORDERS:

1. At the present time, Trustee Alan L. Goldberg (the "Trustee") is not requesting further discovery through the U.S. Bureau of Prisons (the "FBOP") in the form of tape recordings of outgoing calls made by Stephan Jay Lawrence ("Lawrence") from the Federal Detention Center (the "FDC") in Miami, Florida.

2. The Trustee shall have the right to make further requests for tapes of outgoing calls made by Lawrence from the FDC subject to further Order of the Court and consistent with the terms of the Court's December 18,2000 Order Granting Ex Parte Motion for Discovery Under Seal, depending on future events including, but not limited to, overseas litigation.

3. The FBOP shall provide the Trustee with a

phone log of all outgoing calls made by Lawrence from the FDC through January 31, 2001, to the extent he has not already done so.

4. The FBOP shall provide the Trustee with updated phone logs of all outgoing calls made by Lawrence from the FDC during the first week of each month beginning in February, 2001 and ending on May 1, 2001, representing all such outgoing calls from February 1, 2001 through April 30, 2001.

5. All terms and provisions of the Court's Orders requiring the FBOP to provide discovery to the Trustee shall expire on May 1, 2001, on which date the FBOP shall provide the Trustee an updated phone log covering all outgoing calls made by Lawrence from the FDC for the month of April, 2001. Thereafter, no further discovery through the FBOP will be had except by further Order of this Court.

6. This Order shall be made and maintained under seal until further Order of the

DONE AND ORDER ON February 1, 2001.

A. JAY CRISTOL, JUDGE U.S. BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:

STEPHAN JAY LAWRENCE, CASE NO. 97-14687-BKC-AJC

CHAPTER 7 Debtor.

ORDER UNDER SEAL GRANTING TRUSTEE'S MOTION UNDER SEAL TO EXTEND PRIOR DISCOVERY ORDER

THE MATTER came before the Court on May 2, 2001, upon the Trustee's Motion Under Seal to Extend Prior Discovery Order (the "Motion"). The Court, having reviewed the Motion, the Court file and being duly advised in the premises, finds that the relief requested in the Motion should be granted. Accordingly, it is ORDERED:

1. The Motion is GRANTED.

2. The Discovery Order, as defined in the Motion, is extended to June 30, 2001.

3. No further discovery shall be had from the Federal Bureau of Prisons pursuant to the Discovery Order without further Order of the Court.

4. This Order shall be made and maintained under seal until further Order of the Court.

ORDERED in the Southern District of Florida on May 2, 2001.

A. JAY CRISTOL JUDGE U.S. BANKRUPTCY COURT

IN THE MATTER OF:
STEPHAN JAY LAWRENCE, CASE NO.
97-14687-BKC-AJC
Debtor.
ALL MATTERS ON CALENDAR
THURSDAY, JUNE 17, 2004

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THE COURT: Now Mr. Lawrence, as to Mr. Budwick, what is it you think Mr. Budwick would testify to on the issue of whether or not the incarceration remains coercive?

MR. LAWRENCE: That I have no hidden stock accounts.

THE COURT: You think Mr. Budwick would testify that you have no hidden stock accounts?

MR. LAWRENCE: Well, I think he did research on my Internet accounts and I believe, I think there were accusations in Aviv's affidavit that were completely false.

THE COURT: All right. Mr. Budwick, you've heard Mr. Lawrence say that you could testify that he has no hidden stock accounts. Do you agree with that testimony and should the Court accept it as fact?

MR. BUDWICK: I don't know one way or the other whether he has hidden stock accounts.

MR. LAWRENCE: Did you do any research —

THE COURT: Pardon me. He's not on the stand yet, sir.

MR. LAWRENCE: Sorry.

THE COURT: So the question is he says you would

testify that there are none, and you're saying that you don't know, which is somewhat different.

MR. LAWRENCE: I have another —

THE COURT: Just a minute, Mr. Lawrence. I was talking to Mr. Budwick. We'll put you on the stand and be sworn for the simple question that Mr. Lawrence put.

MR. LAWRENCE: There's a second proffer I'd like to make.

THE COURT: Just a moment. We'll do one at a time. Go ahead, Mr. Budwick, be sworn.

Thereupon,

MICHAEL BUDWICK was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LAWRENCE:

Q. Did you find a Mr. Lawrence --

THE COURT: Just a moment, Mr. Lawrence. Your first question was — your first proffer was that Mr. Budwick would testify that on your behalf that he knows that you have no hidden trust accounts.

Now tell me, Mr. Lawrence, how — pardon me, not trust accounts, hidden stock accounts.

MR. LAWRENCE: And trust accounts. Any assets.

THE COURT: Any assets, okay. Tell me how does this relate to the coercive effect of this incarceration?

MR. LAWRENCE: It has to do with a defense to the contempt sanctions.

THE COURT: Well, we are not here with a defense to

it. Therefore, that is overruled.

MR. LAWRENCE: I'd just like to make it clear, in other words, I'm not permitted raise a defense to the contempt sanctions.

THE COURT: We are not here on the contempt sanctions. We are here on determining whether or not the sanctions for contempt remains coercive.

MR. LAWRENCE: But isn't that the contempt sanctions?

THE COURT: No, sir. In any event, Mr. Budwick, you heard what he said and you made a statement from the podium, now make it under oath. Mr. Lawrence believed that you could testify that he didn't have any accounts and do you agree that you know that he doesn't have any accounts or --

THE WITNESS: I could not testify to that effect because I do not know one way or the other whether or not he has hidden bank or stock accounts.

THE COURT: Very well.

BY MR. LAWRENCE:

Q. Did you make any attempts to find hidden assets?

MR. FIERBERG: Judge, I object to the scope.

THE COURT: The objection is sustained. It goes beyond the scope of your proffer. Unless you have a question that relates to his testimony, that is he doesn't know, which is not that he doesn't say that you do have any, but he doesn't say that he knows if you don't have any — in fact, the Court will take judicial notice of the fact that it's usually impossible to prove a negative.

MR. LAWRENCE: Well, I'd simply like to know if he made any investigation to look for hidden assets or accounts.

THE COURT: Well, that, I believe, is immaterial to the issue of whether or not the incarceration remains coercive. You may step down, Mr. Budwick.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 97 - 14687-BKC-AJC

IN RE:

STEPHAN JAY LAWRENCE, Debtor.

DECEMBER 5, 2000

HEARING RE: TRUSTEE'S EX-PARTE MOTION TO RESET STATUS CONFERENCE - UNDER SEAL

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MR. DEAGUIAR: Thirdly, Your Honor, the Government feels that compliance with the Trustee's request would violate both the Privacy Act found at 18 USC 552 (a), I have copies of that statute as well if you would like, Title 5, and also Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968 found at 18 USC Sections 2510 through 2522, and I have copies of pertinent sections with me as well.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

July 9, 2008

No. 07-10295

STEPHAN JAY LAWRENCE,

Plaintiff-Appellee-Cross-Appellant ,

versus

ALAN L. GOLDBERG,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: EDMONDSON, Chief Judge, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Cross-Appellant, Stephen J. Lawrence's Motion to

Reconsider Dismissal for Lack of Jurisdiction is DENIED

(2)

Supreme Court, U.S.
FILED

081433 DEC 8 - 2009

OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

STEPHAN J. LAWRENCE
Petitioner,

v.

ALAN GOLDBERG, ET AL
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX

Stephan J. Lawrence, *pro se*
19500 Turnberry Way # 23A
Aventura, FL 33180
(754) 204-3009

TABLE OF SUPPLEMENTAL APPENDICES[1]

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[1] This Supplemental Appendix is in addition to the Appendix at the end of the Petition for Certiorari and is denoted as "a2."

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 05-20485-CIV-GOLD/TURNOFF

IN RE:

STEPHAN JAY LAWRENCE,

Appellant/Debtor,

REPORT AND RECOMMENDATION

THIS CAUSE is before the undersigned upon the Honorable Alan S. Gold's Order of Reference dated August 25,2006, which refers the following matters to the undersigned: Appellant's Motion for Release From Contempt Incarceration [D.E. 119], Appellee's Motion to Strike/Response in Opposition to Motion by Appellant for Release From Incarceration [D.E. 120], and Appellant's Emergency Request for: (1) a hearing on the Motion for Release of Contemnor, and (2) an Order to Compel Production of Witnesses for Hearing [D.E. 121].

A hearing on these matters was held before the undersigned on Friday, September 22, 2006. Appellant, Debtor, Stephan Jay Lawrence, appeared on his own behalf. Counsel for the Trustee was also present.

I. Background

The Court is quite familiar with the facts of the instant case. As such, the undersigned will only address the history of this matter by way of summary. Stephan Jay Lawrence (Lawrence) is a Debtor who

was incarcerated for civil contempt based on his failure to comply with a bankruptcy court order to turn over the *res* of an inter vivos trust to a Chapter 7 trustee. *See* Lawrence v. Goldberg, et al, 153 Fed. Appx. 552 (11th Cir. 2005) (Lawrence 2005).

One of the key events in this case is the settling of an offshore trust valued at $7 million by Lawrence in January 1991. Lawrence v. Goldberg, et al, 279 F. 3d 1294 (11th Cir. 2002)(Lawrence 2002). Shortly thereafter, an arbitration judgment was issued against him in the amount of $20.4 million. Id.

At some point, it appears that Lawrence had the sole power to appoint Trustees in relation to the trust mentioned *supra*. Id. Over time, several amendments were made to the Trust. In February 1991, a spendthrift provision was added. Id. For example, in January 1993, the Trust was amended so that the settlor's powers could not be executed under duress or coercion and his life interest would terminate in the event of his bankruptcy. Id. A subsequent amendment was made declaring Lawrence to be an "excluded person" under the Trust, thus proscribing his ever becoming a beneficiary of the Trust. Id. In 1999, the Trustees issued a "Declaration of Intent" stating that the excluded person status was irrevocable. Id.

Sometime in June of 1997, Lawrence filed a voluntary petition in bankruptcy. The Bankruptcy Trustee objected to the debtor's discharge. Id. at 1297. During the proceedings, a discovery dispute arose over the sufficiency of Lawrence's answers to interrogatories. Id. In July 1999, the Bankruptcy Trustee sought an order directing Lawrence to turn over the assets of the Trust. The requested order was granted and the court set a status conference in order

to monitor compliance. Id. At the conference, the court found that Lawrence had control over the Trust, through this retained powers to remove and appoint Trustees and to add and exclude beneficiaries, and it rejected Lawrence's impossibility defense. Id. In so doing, the Court held Lawrence in contempt for failing to turn over the Trust assets. Id.

The contempt order was issued on September 8, 1999. Lawrence failed to comply and on October 5, 1999, the bankruptcy court ordered his incarceration pending compliance. On July 31, 2000, the district court affirmed both the Turn Over Order and the contempt orders. Id.

Lawrence remains incarcerated. According to the terms of the contempt order, he is fined $10,000 per day until he purges his contempt. Id. Lawrence continues to claim that on September 13, 19[illegible] he executed a document naming Goldberg as t[illegible] of the Trust and advised the previous Trust[illegible] of his actions. He insists that this is the limit of his power to turn over the assets of the Trust to the Bankruptcy Trustee. Id.

II. Evidentiary Hearing

As noted supra, a hearing took place before the undersigned on September 22, 2006. The matter was expected to go forward as an evidentiary hearing and a court reporter was in attendance. However, no testimony was heard, as Mr. Lawrence continued to assert his fifth amendment privilege.

During the proceedings, Lawrence contended that the Court should hear argument on appellate issues, and matters related to the denial of his sixth amendment rights. Lawrence further argued for the

nullification of prior court orders. Along these same lines, Lawrence discussed his allegation that numerous hearings took place in *ex parte* fashion and that he was never given the opportunity to confront his accusers.

The undersigned's review of the record reveals that there are no pending appellate matters. It is this Court's understanding that the Honorable Alan S. Gold entered an Order enjoining Lawrence from filing any other appeals or pleadings. *See* Order Denying Mot. Reconsider (June 1. 2005) [D.E. 51]. Further, on March 23, 2006, Judge Gold entered an Order Striking Pleadings [D.E. 116]. In that order it was made clear that "if the filings from Appellant [are] not related to the issue of whether his continued incarceration has lost its coercive effect, those filings will be dismissed sua sponte. Id. The June 1, 2005 order, *inter alia*, was summarily affirmed by order of the Eleventh Circuit Court of Appeals on July 19, 2006. *See* [D.E. 118].

During the instant proceedings, the Court reminded Lawrence of the record below and the limited scope of the undersigned's referral. In this regard, it was repeatedly suggested that Lawrence focus his argument on the issue of release from incarceration and the present state of the contempt order's coercive effect. In response to the Court's suggestion, Lawrence briefly addressed the issue of the applicability of 28 U.S.C. § 1826.

III. Relevant Statute

28 U.S.C. § 1826. Recalcitrant Witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury

> proceeding of the United States refuses without just cause to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of-
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen (18) months.

28 U.S.C. § 1826.

Lawrence argues that he is a recalcitrant witness under § 1826, and that as such, he should have been released after eighteen (18) months. The Trustee disagrees. As a general matter, case law interpreting this statute has found that it is applicable in bankruptcy proceedings. See *In re Martin-Trigona*, 732 F. 2d 170 (2d Cir. 1984)(the use of the word "any" in subsection (a) of this section--providing that a court may confine a witness whenever a witness in any proceeding before or ancillary to any court refuses to comply with an order of the court to testify or provide other information-indicated that Congress intended this section to apply to bankruptcy proceedings). However, in its June 3, 2004 Memorandum Opinion,

the Bankruptcy Court specifically considered, and rejected, Lawrence's argument that he was a recalcitrant witness under the instant statute. In the Memorandum, Judge Cristol quotes from a 2002 Second Circuit opinion. The relevant portion of the opinion states:

> In Securities and Exchange Comm'n v. Princeton Economics Int'l. Ltd.. 152 F. Supp. 2d 456, 459 n.2 (S.D.N. Y. 2001), appeal dismissed, 284 F. 3d 404 (2d Cir. 2002), the district court stated that, "[t]he 'Recalcitrant Witness' statute is inapplicable to this matter because §1826 sets a maximum limit of 18 months incarceration for witnesses found in civil contempt,[sic] usually pertains to grand jury proceedings, and does not because of the ipse dixit of counsel apply to one court order to produce missing assets, especially since § 1826 is not cited anywhere in the Contempt Order." Likewise, Lawrence's case does not involve grand jury proceedings and the Contempt Order, authored by the undersigned Judge, does not reference section 1826.
>
> The act required of Lawrence, the turnover of the res of an offshore asset-protection trust, is simply not one of the acts delineated in the unambiguous provisions of section 1826(a). That section contemplates refusal without just cause, to comply with a court order "to testify or provide other information, including any book, paper, documents, record or other material....," 28 U.S. C. § 1826, none of which is contemplated in this case.
>
> ....Here, Lawrence is only in contempt of

> that part of the Turnover Order requiring him to repatriate the Trust res, not to provide an accounting which might otherwise fall under the rubric of section 1826.

See Memorandum Opinion Denying Debtor's Mot. for Immediate Release of Contemnor and Setting Further Hearing to Determine Status of Case, Case No: 97-14687-BKC-AJC (June 3, 2004).

In short, the issue of § 1826 has already been determined. Further, the scope of the instant referral is limited strictly to the question noted supra, i.e., whether the contempt sanction has lost its coercive effect given the length of Lawrence's incarceration. In this instance, the Court need not address § 1826 on the merits in order to resolve the limited issue before it.

IV. Analysis

A. Civil Contempt Generally

A bankruptcy court has the power to imprison a debtor for contempt of court when he fails to comply with a "turn over order." *See* In re Hardy, 97 F. 3d 1384 (11th Cir. 1996). Civil contempt sanctions are, of course, employed by the courts to secure compliance with their orders. See In re Grand Jury Investigation (Braun), 600F.2d420, 422 (3d Cir. 1979)(embedded in Anglo-American law is the inherent power of the judiciary to coerce obedience to its orders by summarily holding a recalcitrant person... in civil contempt, and then imprisoning him until he complies). Once a proper showing of a violation of the order had been made, "the burden of production then shifts to the alleged contemnor, who may defend his failure on the grounds that he was unable to comply...

In order to succeed on the inability defense, the alleged contemnor must go beyond a mere assertion of inability and establish that he has made in good faith all reasonable efforts to meet the terms of the court order he is seeking to avoid. Id. (citing Commodity Futures Trading Comm'n v. Wellington Precious Metals, 950 F. 2d 1525, 1529 (11th Cir. 1992)).

Here, as noted supra, Lawrence continued to assert and allege violations of sixth amendment rights, nullity of the proceedings below, and pending issues on appeal throughout the hearing. He made little or no comments, let alone arguments, on the issue of the contempt sanction and the loss of its coercive effect. His refusal to testify and continued repetition of statements made below regarding his fifth amendment privilege further complicated this Court's task.

In short, despite being reminded of the narrow issue before the court, Lawrence failed to go beyond the prior assertions he made in the various proceedings below. In light of the foregoing, this court has no choice but to find that Lawrence has failed to meet his burden to establish that he has made in good faith all reasonable efforts to meet the terms of the contempt order at issue.

B. Realistic Possibility of Compliance

Generally, prison time, in and of itself, will not satisfy the burden of proving that there exists no "realistic possibility" that the contemnor can comply with the court's order. Id. at 1530. While each passing month of incarceration may strengthen a claim of inability, "It can be assumed that at a certain point any man will come to value his liberty more than [the

amount of money the order requires him to pay and the pride lost in admitting that he has lied." Id. (quoting Thorn v. Jenkins, 760 F. 2d 736, 740 (7th Cir. 1985)).

In Thorn, the contemnor (held for failure to pay a fine and file a certificate attesting as to the payment) had been imprisoned for 15 months at the time of the opinion. In that case, the court warned: "If after many months, or perhaps even several years, the district judge becomes convinced that, although [contemnor] is able to pay he will steadfastly refuse to yield to the coercion of incarceration, the judge would be obligated to release [him] since incarceration would no longer serve the purpose of the civil contempt order - coercing payment." In so doing, the court then ordered the district court to reconsider the issue of incarceration at "reasonable intervals." Id.

As a general matter, when considering a motion to terminate a civil contempt order, "the district court must make an individualized determination as to whether there exists a realistic possibility that the contemnor will [comply]." *See* In re Grand Jury Proceedings (Howald), 877 F. 2d 849, 850 (11th Cir. 1989); see also, Simkin v. U.S., 715 F. 2d 34, 37 (2d Cir. 1983)("As long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue. But if the judge is persuaded... that the contempt power has ceased to have a coercive effect, the civil contempt remedy should be ended.")(testimony of grand jury witness).

The burden is on the contemnor to prove that "no such realistic possibility exists. Id. at 37. On review, the findings of a district court in this regard are subject to an abuse of discretion standard. See

Commodity Futures Trading Commission v. Wellington Precious Metals, Inc., 950 F. 2d 1525, (citing In re Grand Jury Proceedings (Howald), 877 F. 2d at 850, (In determining whether a civil contempt sanction has lost its coercive effect, a district court judge has virtually unreviewable discretion)). In this regard, the trial judge need not accept a contemnor's avowal not to testify, but must consider whether the circumstances reflect that there is no possibility that the contemnor will testify. See Simkin, 715 F.2d. at 37.

Here, the undersigned has conducted an individual determination as to whether there exists a realistic possibility that Lawrence will comply. During the proceedings Lawrence stated (in his role as a pro se litigant), among other things, that he, "never had any control of the trust," "[does] not have the ability to comply, "[has] no immunity." Judging by Lawrence's comments and demeanor, it does not appear that he intends to comply any time soon. Because Mr. Lawrence refused to testify and/or present evidence on the issue, it is not clear whether he has any future plans and/or ability to comply. Hence, the undersigned finds that he has failed to meet his burden in this regard as well.

Notwithstanding the above, the Court is troubled by the fact that Lawrence has been incarcerated for approximately six (6) years, and that his ongoing contempt sanction appears to have no end in sight. The Eleventh Circuit's cautionary words put it best:

> As we affirm the challenged orders, we are constrained to remind the district court and the Bankruptcy Court that, "civil contempt sanctions are intended to coerce compliance

> with a court order. In Wellington we acknowledged that 'When civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights.' The district court must make a determination in each case whether there is a realistic possibility that the contemnor will comply with the order. We are mindful that, "although incarceration for civil contempt may continue indefinitely, it cannot last forever."

Lawrence 2002 at 1300. (emphasis added).

In that particular order, the appellate court instructed the bankruptcy court to reconsider Lawrence's incarceration at reasonable intervals in order to assure that the contempt sanction continues to serve, and is limited to, its stated purpose of coercion.

V. RECOMMENDATION

In sum, Lawrence was given a full hearing, and the opportunity to testify and present evidence. He declined both offers, and instead, continued to argue matters outside of this Court's limited referral. For reasons stated above, the undersigned finds that: 1) Stephan Jay Lawrence has failed to meet his burden to show that the contempt order has lost its coercive effect; 2) Stephen Jay Lawrence has failed to meet his burden to show that there exists no realistic possibility of compliance; and 3) The matter should be revisited by the bankruptcy court at reasonable intervals.

In light of the foregoing, the undersigned RESPECTFULLY RECOMMENDS that: 1) Lawrence's Motion for Release from Contempt

Incarceration [D.E. 119] be DENIED; 2) Appellee's Emergency Motion to Strike/Response in Opposition to Motion by Appellant for Release from Incarceration [D.E. 120] be DENIED; and that 3) Appellant's Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing [D.E. 121] be DEEMED MOOT.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections with the Honorable Alan S. Gold, United States District Judge, within ten (10) days of being served with a copy of this Report and Recommendation. Failure to file timely objections shall bar the parties from attacking on appeal any factual findings contained herein. RTC v. Hallmark Builders, Inc.. 996 F. 2d 1144, 1149 (11th Cir. 1993); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED on this 6th day of October 2006.

William C. Turnoff

United States Magistrate Judge

cc: Hon. Alan S. Gold

Counsel of Record

Stephan Jay Lawrence, pro se Inmate # 04061-004, Federal Detention Center, P.O. Box 19120, Miami, FL 33101-9120